Supreme Court, U.S.
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No. 04-1590

IN THE

Supreme Court of the United States

MAXIM PHARMACEUTICALS, INC.,
LARRY STAMBAUGH and KURT GEHLSEN,

Petitioners,

v.

CROSSPOINT VENTURE PARTNERS 1997, L.P., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF CALIFORNIA,
FOURTH APPELLATE DISTRICT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In an unpublished opinion, a California appellate court applied settled Ninth Circuit law to find that the scope of a narrow arbitration provision precluded compelled arbitration of tort claims that arose before the contract was formed. It decided no federal question nor did it create any conflict in federal law. Did the state court err in ruling under Ninth Circuit law that the scope of the narrow arbitration provision precludes compelled arbitration of tort claims that arose before the contract was formed?

2. Respondents held shares in Cytovia, Inc. (Cytovia), which was a party to the contract at issue in this case. The contract enumerates its three parties, and does not include respondents. Beyond that (with the exception of two specific provisions not pertinent here) the contract expressly provides that there are no third party beneficiaries. If this Court was otherwise inclined to grant the petition, does respondents' status as mere incidental beneficiaries to the contract—against which the arbitration provision could not be enforced in any event—render this case an inappropriate one to decide the first question?

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Crosspoint Venture Partners 1997, L.P., et al. (Cytovia Stockholders) urge that the petition for certiorari be denied. In this opposition brief, "petitioners" or "Maxim" refers to Maxim Pharmaceuticals, Inc., Kurt R. Ghelsen, and Larry Stambaugh, unless otherwise indicated.

STATEMENT OF THE CASE

A. Maxim's Fraud to Obtain Approval of the Merger.[1]

Cytovia was a San Diego-based, privately-held biotechnology company. (Petitioner's Appendix [Pet. App.] 4a.) In June 2000, Maxim, a publicly-traded company, acquired Cytovia through a merger in which Cytovia stockholders received Maxim stock in exchange for their Cytovia stock. (*Id.*)

Central to the merger was Maxim's representations of extremely positive Phase III clinical trial results in March 2000 for Maxamine, a new drug that Maxim touted as its most promising one. (*Id.*) Maxim represented that when Maxamine was used with another drug, Maxamine resulted in a statistically significant increase in survival for patients with metastatic melanoma. (*Id.*)

The Phase III clinical trial was so critical to the merger discussions that in April 2000 Cytovia Stockholders hired a consultant to review the information provided by Maxim concerning it. (1 Appellants' Appendix [A.A.] 7.) In early May 2000, Maxim issued a press release announcing very

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[1] This summary, as the court of appeal's opinion notes, is based primarily on the Cytovia Stockholders' complaint. (Pet. App.4a.)

positive results from the Phase III clinical trials.: (1 A.A. 7; 2 A.A. 245.)

The Cytovia Stockholder's consultant, Cytovia's founder, and other board members met with Maxim's Chief Scientist Gehlsen (among others). (1 A.A. 8.) The consultant asked—more than once—for Maxim's entire regulatory file concerning the Phase III clinical trial and specifically all Food & Drug Administration (FDA) correspondence. (*Id.* at 7-8.) Gehlsen gave the consultant a file with 15 to 20 pages in it. (*Id.* at 8.) The file contained no negative comments from the FDA about the clinical trial. (*Id.*) When the consultant asked Gehlsen if he could review the original data from the clinical trial, Gehlsen said there was no need, and misrepresented (among other things) that the clinical trial was randomized, the treatment arms of the study were homogeneous, and that there were no discordances or skewedness between them. (*Id.*)

Finally, in early June 2000, to induce the Cytovia Stockholders to approve the proposed merger, Maxim issued another false press release making misrepresentations similar to those described above. (1 A.A. 9; 2 A.A. 253.) A week later, Maxim distributed to Cytovia Stockholders an Information Statement that reiterated its misrepresentations about the March 2000 Phase III clinical trial of Maxamine as a treatment for malignant melanoma. (1 A.A. 9-10; 2 A.A. 258, 265.)

B. The Merger and Merger Agreement.

In June 2000, in reliance on Maxim's misrepresentations and omissions, the Cytovia Stockholders approved the merger. (Pet. App. 4a-5a, 12a; 1 A.A. 9-10.)

The Merger Agreement (Merger Agreement or Agreement) expressly recited that its parties were Maxim, Maxim's acquisition company M-80 Acquisition Corp. (M-80), and Cytovia. (Pet. App. 4a-5a.) The Merger Agreement also expressly addressed the rights of third parties such as the Cytovia Stockholders. Section 10.14 provided that "[e]xcept for the provisions of Sections 1.5 and 1.6, none of the provisions is intended to provide any rights or remedies to any Person other than the parties hereto." (*Id.* at 5a.) The Agreement's arbitration clause required "the parties" to arbitrate disputes that related to "the interpretation or performance of" the Agreement. (*Id.* at 5a.)

Six months after the merger in December 2000, in a rare unanimous vote, the FDA denied Maxim's new drug application for Maxamine. (Pet. App. 5a; 1 A.A. 10; 2 A.A. 332, 402-03.) The FDA strongly criticized Maxim's Phase III clinical trial. (2 A.A. 337-43.) It described in detail a history of written and oral communications between the FDA and Maxim dating to April 1997 in which the FDA was highly critical of the clinical trial and which showed Maxim's application was doomed to fail. (1 A.A. 14; 2 A.A. 337-43.) None of these communications had been provided to the Cytovia Stockholders or their consultant. (1 A.A. 14, 15.) FDA statistical analyses also showed the trial failed to demonstrate a statistically significant increase in patient survival—directly contradicting Maxim's representations in press releases and the Information Statement. (2 A.A. 425-27; compare with 265.)

C. Procedural Summary.

In October 2001, the Cytovia Stockholders filed their complaint in California state court against Maxim, Stambaugh, and Gehlsen for fraud and negligent misrepresentation. (Pet. App. 5a.) The Cytovia Stockholders did not allege any contract-based claims. (*Id.*; 1 A.A. 1-21.)

Maxim petitioned the trial court to compel the Cytovia Stockholders to arbitration, contending they were bound by the arbitration provision even though they did not sign it. (Pet. App. 6a.) The Cytovia Stockholders argued in opposition that they were not parties to the Agreement nor were they its third party beneficiaries and, alternatively, that their tort claims did not relate to the interpretation or performance of the agreement. (*Id.* at 6a, 7a.) The trial court granted the petition, finding the Cytovia Stockholders were third party beneficiaries of the Agreement. (*Id.* at 6a.)

Once erroneously ordered to arbitrate their claims, the Cytovia Stockholders included among their arbitration claims a contract claim (over Maxim's objection), which the court of appeal found was merely an "effort to exhaust every reasonable means to obtain a recovery" and not, as Maxim asserted, a waiver of the Cytovia Stockholders' right to a jury trial. (Pet. App. 14a, 16a.) Ultimately, the arbitrators found against the Cytovia Stockholders and awarded almost a million dollars in attorneys' fees and costs against them. (3 A.A. 482-85.) The trial court confirmed the arbitration award and entered judgment for Maxim. (Pet. App. 7a.)

Without reaching the question whether the Cytovia Stockholders could be forced into arbitration, the court of appeal decided that their pre-contract tort claims:

> [D]o not involve a dispute relating to the interpretation of the agreement, nor do they involve a dispute relating to the performance of the executed agreement. We conclude that the claims arose from allegedly tortious conduct that commenced before the expressly identified parties—Maxim Pharmaceuticals, M-80, and Cytovia—executed the agreement, and thus do not relate to the performance of the executed agreement.

(*Id.* at 13a.) Maxim petitioned the California Supreme Court for review. Within a few days of Maxim's filing a reply brief, that court issued its order denying review, without indicating that any justice had voted to grant review. Maxim's petition to this Court is from that order.

II. THE PETITION FAILS TO MEET THE CRITERIA FOR CERTIORARI.

A. Nothing in This Case Fits Within the Rule 10 Criteria for Review of State Court Cases.

1. The California Court of Appeal's Decision Did Not Create a Conflict in Authority on an Important Federal Question.

Supreme Court Rule 10 identifies the two types of state court cases that can justify granting a writ of certiorari. Sup. Ct. R. 10(b), (c). The petition fits within neither of them.

Supreme Court Rule 10(b) provides that decisions of state courts of last resort that create a conflict in authority on an important federal question might justify review on a petition for a writ of certiorari. It is undisputed in this case that the court of appeal's unpublished decision creates no important federal conflict, for at least two reasons.

First, even if it created a conflict in federal law, the opinion is not published and thus affects only the parties to this case. Under California law, unpublished decisions are not citable as precedent, except by the parties for res judicata purposes. Cal. Rules of Court, Rule 977(a)-(b)(1).

Second, the opinion straightforwardly applies Ninth Circuit law on the question whether a narrow arbitration provision requiring the arbitration of parties' claims about the "interpretation or performance" of an agreement compels the arbitration of tort claims arising before the agreement was signed. This creates no federal conflict on its face, important or unimportant.

2. The Court of Appeal Did Not Decide an Important Federal Question.

Supreme Court Rule 10(c) provides that review may be justified on a petition for a writ of certiorari when a state court of last resort has decided an important federal question that has not been, but should be, decided by the Supreme Court. Again, as noted throughout this brief, the court of appeal's decision did nothing more than correctly apply settled Ninth Circuit law to the dispute between these parties—a decision that can affect no one other than the parties.

This case thus does not merit review under Supreme Court Rule 10 on any basis. The petition tries to create a (false) impression that this case somehow presents a question of conflicts in circuit courts of appeals by ignoring Supreme Court Rule 10 and by omitting two critical facts that render this case an inappropriate vehicle for considering any such conflict that might exist in another case. One is that the Merger Agreement specifically limits its arbitration provision to the named parties to the Agreement, which respondents are not. The other is that the agreement contains a third party beneficiary disclaimer clause, so even if (as the trial court but not the appellate court found) respondents would otherwise be the Agreement's third party beneficiaries, the parties' intent on the face of their contract was to exclude any such beneficiaries. In sum, the issues in the case depend upon the specific language of the contracting parties' Agreement and the unique factual scenario present here—a scenario the petition scarcely adverts to, let alone addresses. Nothing in the petition merits granting the writ petition.

B. The California Appellate Court Correctly Decided that the Cytovia Stockholders' Fraud Claims Were Not Arbitrable.

The California Court of Appeal's unpublished, unanimous decision correctly decided the Cytovia Stockholders' claims for fraud and negligent misrepresentation were not arbitrable under the narrow language of the Merger Agreement. (Pet. App. 10a.) Under California law, the scope of an arbitration provision rests solely upon the parties' contract. (Pet. App. 9a;

see also Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street, 35 Cal. 3d 312, 322–23 (1983)). Doubts about whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration. (Pet. App. 9a.)

The appellate court correctly recognized, however, that "[t]here is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate." (*Id.* citing *Eng'rs & Architects Ass'n v. Cmty. Dev. Dept.*, 30 Cal. App. 4th 644, 653 (1994).) And, despite California's and the FAA's strong policies favoring arbitration, the "substantial right of a litigant to pursue claims in a judicial forum is not lightly deemed waived," and the general policies favoring arbitration cannot control over express contractual language showing parties have not elected to arbitrate a dispute. (Pet. App. 9a (citing *Mayhew v. Benninghoff*, 53 Cal. App. 4th 1365, 1371 (1997)).)

The Cytovia Stockholders do not dispute that scope clauses are generally construed liberally. The California appellate court properly applied Ninth Circuit law in determining the Cytovia Stockholders' tort claims are not arbitrable. (Pet. App. 10a–13a.) In *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458 (9th Cir. 1983), the court examined an arbitration clause providing that "any disputes arising hereunder or following the formation of joint venture shall be settled through binding arbitration." *Id.* at 1461 (finding "arising hereunder" synonymous with the narrow "arising under the agreement" language covering only disputes relating to interpretation and performance of the contract). The *Mediterranean* court, itself applying and

interpreting California law, held that disputes regarding "interpretation and performance" of the contract itself are expressly "intended to cover a much narrower scope of disputes." *Id.* at 1464. The court distinguished narrower clauses from those defining as arbitrable disputes "arising out of or relating to" an agreement—the standard language recommended by the American Arbitration Association (AAA). The court classified such language as "broad" and subject to more liberal application. *Id.*

The *Mediterranean* court found that omitting the broad language, as the Merger Agreement does, to be "significant." *Id.* Thus, notwithstanding the strong presumption in favor of arbitrating disputes, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Id.* at 1463, citing *United Steel Workers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). Accordingly, Mediterranean concluded that the conspiracy and inducement claims alleged activity outside the scope of the arbitration clause. *Mediterranean Enters., Inc.*, 708 F.2d at 1464–65.

Maxim relies heavily on *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 396 (1967), citing it for the proposition that, in interpreting the scope of a "broad" arbitration provision, this Court expressly recognized that fraudulent inducement claims should be arbitrated when "there is no evidence that the contracting parties intended to hold that issue from arbitration." (Maxim Pet. at 7, 11.) Maxim attempts to create conflict where none exists. The clause here does not contain "arising under" or "arising out of" language found in *Prima Paint*. Rather, the language of sections 10.18 and 10.19 of the Merger Agreement is both plain and precise—requiring "the parties" to arbitrate only

disputes "*relating to interpretation or performance* of [the Agreement]." (Pet. App. 9a (emphasis by appellate court).)

Contrary to Maxim's contentions, neither *Prima Paint* nor California law favor arbitration of the tort claims at issue here. To reach the conclusion that the Cytovia Stockholders' claims are arbitrable, Maxim relies on several cases examining whether the language "arising out of" or "arising under" requires that fraudulent inducement claims be arbitrated. (Maxim Pet. at 13-14 n.3, and 15.) Maxim effectively redrafts the Agreement to read that "any and all disputes between the parties to the Agreement and the Cytovia Stockholders" are subject to arbitration. But the clause does not contain the "arising out of" or "arising under" language. Rather, it explicitly states that only claims relating to interpretation or performance of the Agreement are subject to arbitration, and only the parties' claims. (Pet. App. 9a.) Thus, the appellate court expressly found the Merger Agreement's clause is narrow—not broad—and determined clear evidence in the contractual language indicates the parties intended to exclude the Cytovia Stockholders' claims from arbitration. (*Id.* at 10a-13a.)

In the state court actions, the Cytovia Stockholders asserted no claims based on respondents' breach of or failure to perform under the Agreement, nor did they assert a claim based on the breach of contractual representations or warranties. (*Id.* at 11a.) Instead, they alleged Maxim defrauded them before they approved the merger. (*Id.* at 11a-12a.) The appellate court also noted that the Cytovia Stockholders' allegations related to false statements in press releases Maxim issued which induced the Cytovia Stockholders to support the proposed merger. (*Id.* at 12a.)

After reviewing the complaint's allegations in detail, the appellate court concluded that the factual allegations demonstrated the Cytovia Stockholders' tort claims against Maxim involve a dispute relating to a series of fraudulent representations and omissions that began *before* the Cytovia Stockholders approved the Merger and before the parties executed the Agreement. (*Id.* at 13a.) The appellate court therefore concluded that the Cytovia Stockholders' claims exist apart from any contractual theories and are outside the scope of the Agreement's narrow arbitration clause, as the claims do not involve a dispute relating to interpretation or performance of the parties' Agreement. (*Id.* at 13a–14a.) *See Bancomer, S.A. v. Superior Court*, 44 Cal. App. 4th 1450, 1461–62 (1996); *see also Britton v. Co-op Banking Group*, 4 F.3d 742, 748 (9th Cir. 1993) (finding that "subsequent, independent acts of fraud, unrelated to any provision or interpretation of the contract").

The court of appeal's decision is consistent with settled law at the time the parties to the Merger Agreement—Maxim, M80, and Cytovia—agreed to their contract. These parties expressly relied on the law at the time when interpreting the provisions and agreeing to be bound. As the Second Circuit has repeatedly recognized in declining to overrule *In re Kinoshita & Co.*, 287 F.2d 951 (2d Cir. 1961)—doing so would undermine the contracting parties' intent and result in a miscarriage of justice to change the law on which the parties relied and thereby change the meaning of the contract provisions. *See S.A. Mineracao Da Trindade-Samitri v. Utah Int'l., Inc.*, 745 F.2d 190, 194 (2d Cir. 1984).

C. Alternative Grounds Support the Judgment of the Court of Appeal and Thus This Court's Denial of the Petition, Specifically, the Merger Agreement's Express Terms Demonstrate that the Cytovia Stockholders Were Not Parties to It.

The appellate court elected to "assume without deciding [whether] the Cytovia Stockholders were either parties to or intended third party beneficiaries of the Agreement," and, based on its de novo review, held that in any event their claims were outside the scope of the arbitration clause. (Pet. App. 10a–11a.) Nonetheless, the court specifically noted that only Maxim, M80, and Cytovia were parties to the Merger Agreement. (*Id.* at 13a; Resp. App. 1.) An agreement to arbitrate is a creature of contract, and the ultimate question of whether a litigant agreed to arbitrate is determined by state law. *Bell v. Cendant Corp.*, 293 F.3d 563, 566 (2d Cir. 2002); *Paracor v. Fin., Inc. v. General Electric Capital Corp.*, 96 F.3d 1151, 1165 (9th Cir. 1996) ("an arbitration clause, is a contractual right and generally may not be invoked by one who is not a party to the contract in which it appears").

Maxim argues that the Cytovia Stockholders, as nonsignatories and nonparties, are bound to the Agreement. (Maxim Pet. at 10.) As noted above, the trial court found that the Cytovia Stockholders were third party beneficiaries of the Agreement. (Pet. App. 6a n.4.) Although the appellate court decided the issue of arbitrability based on the Agreement's scope, the decision can be upheld on independent grounds—that the Cytovia Stockholders were not parties to the Agreement and thus not parties to the Agreement's arbitration clause, nor were they third party beneficiaries to the Agreement.

1. The Cytovia Stockholders Cannot Be Compelled to Arbitrate Their Claims and Give Up Their Jury Trial Rights Under an Agreement to Which They Were Not Parties.

The premise of Maxim's argument is that any doubts about whether a dispute is arbitrable must be resolved in favor of compelling arbitration. Maxim, however, incorrectly concludes that the Cytovia Stockholders are "parties" to the Agreement, and therefore applies the presumption in favor of arbitration. (Maxim Pet. at 8–9.) "A proceeding to compel arbitration is in essence a suit in equity to compel specific performance of a contract." *Freeman v. State Farm Mut. Auto. Ins. Co.*, 14 Cal. 3d 473, 479 (1975). Thus, the Cytovia Stockholders cannot be compelled to arbitrate their claims unless they are parties to the Agreement or third party beneficiaries to it—the sole source of any agreement to arbitrate. *See Banner Entertainment, Inc. v. Superior Court*, 62 Cal. App. 4th 348, 356 (1998) (court order compelling arbitration simply compels specific performance of a contract).

The Merger Agreement expressly identifies its parties as: Maxim, M80 (a wholly owned subsidiary of Maxim) and Cytovia. (Resp. App. 1.) The Agreement cannot be so broadly construed as to encompass parties that were not intended by the express contractual language. *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 77576 (2d Cir. 1995). The Agreement further expressly limits the scope of its arbitration clause to only those disputes "aris[ing] between the parties." (*See* Pet. App. 9a–10a n.7 (emphasis added).) The express contractual provisions thus compel a finding that the Cytovia Stockholders are not "parties" to the Agreement and thus are

not bound to its arbitration provisions. *Benasra v. Marciano*, 92 Cal. App. 4th 987, 991–92 (1992). To hold otherwise would rewrite the contract's express terms.

2. The Cytovia Stockholders Are Not Bound to the Agreement as Non-Signatories.

Maxim also contends the Cytovia Stockholders, as nonsignatories, are estopped from claiming the arbitration clause does not apply to their claims. (Maxim Pet. at 10 (citing *NORCAL Mutual Ins. Co. v. Newton*, 84 Cal. App. 4th 64 (2000)).) In *NORCAL*, the court held that a nonsignatory spouse who accepted a defense from her husband's medical malpractice insurer and demanded that the insurer pay to settle claims against her was bound by the policy's arbitration provision. *NORCAL*'s rationale is that a person cannot demand contract performance when it benefits him or her, and then try to avoid the contract's arbitration provision. *NORCAL*, 84 Cal. App. 4th at 84. Unlike the spouse in *NORCAL*, the Cytovia Stockholders demanded nothing under the Merger Agreement in suing appellants for fraud, and they received only what sections 1.5 and 1.6 specifically provided (stock exchange provisions) subject to express provisions that the Agreement's terms could not be invoked by or enforced against them. (Resp. App. 1a-4a.)

3. The Cytovia Stockholders Are Not Intended Third Party Beneficiaries Under the Merger Agreement as a Matter of Law.

Under California contract law, a party cannot be compelled to arbitrate its claims as a third party beneficiary unless the parties to the contract: (1) intended and (2) expressly provided the third party is a beneficiary.

Cal. Civ. Code § 1559 (permitting a litigant to be an intended third party beneficiary only if the contract is "made expressly for the benefit of a third person"). Further, only intended third party beneficiaries can invoke or be obligated under provisions of a contract to which they were not parties. *See Hess v. Ford Motor Co.*, 27 Cal. 4th 516, 524 (2002).

The distinguishing characteristic of third party beneficiaries is their "legal right to enforce contracts to which they are not a party." *Nationwide Mutual Ins. Co. v. Home Ins. Co.*, 150 F.3d 545, 550 (6th Cir. 1998). Without clear intent and express contractual provisions to the contrary, third parties to a contract are at most incidental beneficiaries without any rights or obligations who cannot be forced to comply with an arbitration clause. *See Jones v. Aetna Casualty & Surety Co.*, 26 Cal. App. 4th 1717, 1725 (1994); *Mariani v. Price Waterhouse*, 70 Cal. App. 4th 685, 704 (1999); Restatement (Second) of Contracts, §§ 302, 315 (1981). California law governing contract interpretation[2] determines whether the Cytovia Stockholders are intended third party beneficiaries of the Agreement. *Hess*, 27 Cal. 4th at 524.

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[2] "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone." Cal. Civ. Code § 1639. "The whole of [the] contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Cal. Civ. Code § 1641. The parties' intent must appear "'on the terms of the contract.'" *Cal. Emergency Physicians Med. Group v. PacifiCare of Cal.*, 111 Cal. App. 4th 1127, 1138 (2003) (quoting *Jones*, 26 Cal. App. 4th at 1724). The objective intent of the contracting parties, as evidenced by the express language of the contract, not the subjective intent of one party, controls the interpretation. *Titan Group, Inc. v. Sonoma Valley County Sanitation Dist.*, 164 Cal. App. 3d 1122, 1127 (1985); accord *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

Here, the Agreement's express language in section 10.14 explicitly barred the Cytovia Stockholders from claiming any rights under any provisions of the Agreement, other than the stock exchange provisions under sections 1.5 and 1.6. (Resp. App. 1a-3a.) Thus, in addition to the language of sections 10.18 and 10.19 governing arbitration between the "parties" to the Agreement, section 10.14 contains an express third party beneficiary disclaimer which precludes the Cytovia Stockholders from obtaining any rights other than exchanging their Cytovia stock for Maxim stock under sections 1.5 and 1.6. (*Id.*) Most probative of the parties' intent is their express exclusion of non-signatories as parties and the limitations of the Cytovia Stockholders' rights and remedies under section 10.14. (*Id.* at 4a.) Because no language in the Agreement suggests an intent to confer a direct benefit on the Cytovia Stockholders other than sections 1.5 and 1.6, which are expressly carved out of the third party beneficiary disclaimer in section 10.14, the Agreement's covenants and conditions run only to the parties (Maxim, M80, and Cytovia). Cal. Civ. Code § 1559. The provisions of the Agreement cannot be invoked by or against the Cytovia Stockholders. (Resp. App. 1a, 4a; *see also Hess*, 27 Cal. 4th at 524.)

Despite the express contractual language precluding the Cytovia Stockholders from being bound to the Merger Agreement's arbitration clause, Maxim relies on *Mormile v. Sinclair*, 21 Cal. App. 4th 1508, 1511 (1994), in arguing that the Cytovia Stockholders are bound to the Agreement as non-signatories under a third party beneficiary theory. *Mormile*'s facts and rationale are inapplicable.

In *Mormile*, a patient who signed the operative arbitration clause sued her doctor for malpractice. Her husband (a non-

signatory) asserted a loss of consortium claim. *Mormile*, 21 Cal. App. 4th at 1510. The arbitration clause provided: "All Claims Must Be Arbitrated: It is the intention of the parties that this agreement bind all parties whose claims may arise out of or related to the treatment or services provided by the physician, including any spouse or heirs of the patient." *Id.* (emphasis added). The court reasoned that this language was broadly drafted to include all claims arising out of the services for which the signatory spouse contracted. *Id.* at 1513. The court concluded that ordering the husband's claims arbitrated was consistent with the statutory goal of stemming escalating malpractice insurance costs and was essential to furthering the preference for joining claims for loss of consortium and negligence. *Id.* at 1511-12, 1515. The most important factor in the court's ordering the non-signatory spouse to arbitration, however, was the plaintiff/patient's right to privacy, which would be violated by a separate jury trial of a third party's claims. *Id.* at 1512, 1515.

In contrast to the Cytovia Stockholders, the husband in *Mormile* was explicitly recognized as a third party beneficiary in his wife's agreement. *Mormile* also concerned a specific statutory scheme and its particular policy concerns, which are absent here. Indeed, the public policy here is against depriving non-parties to arbitration agreements of their jury trial rights unless their waiver is clear and unmistakable. *Benasra*, 92 Cal. App. 4th at 992. Thus, where, as here, the contract language precludes third party beneficiaries, and the Cytovia Stockholders as non-contracting parties clearly disclaim third party beneficiary status, there is a strong policy against compelled arbitration in deference to the fundamental right to a jury trial. *Id.* at 990.

The Agreement's express language compels the conclusion that the Cytovia Stockholders are not bound to arbitrate; indeed, it would violate public policy to compel them to do so. If non-signatory stockholders of a company are bound to arbitration provisions of a merger agreement, despite express third party beneficiary disclaimer clauses, then all stockholders involved in corporate mergers which include an arbitration clause would be forced to arbitrate their claims. This result would unfairly deprive stockholders of their jury trial rights even where, as here, third party beneficiary status under the operative agreement is expressly disclaimed.

CONCLUSION

Maxim incorrectly assumes that the issue raised in its petition is presented in this case. The petition arises from an unpublished state court decision that binds only the parties. Even if the Court were inclined to review the issue, this is not the proper case to do so. Respondents are neither parties to nor intended third party beneficiaries to the contract that includes the arbitration clause of which Maxim seeks interpretation.

Respectfully submitted,

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